

Pires Do Nascimento (Migration) [2020] AATA 5275 (22 November 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Wanderson Pires Do Nascimento
CASE NUMBER:	1832043
DIBP REFERENCE(S):	BCC2018/1165127
MEMBER:	Peter Haag
DATE:	22 November 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa: • Public Interest Criterion 4020 for the purposes of cl.500.217(1) of Schedule 2 to the Regulations.

Statement made on 22 November 2020 at 12:29pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document or false or misleading information in visa application – bank statement as evidence of financial resources – department officer identified inconsistencies with genuine statement – affidavit by bank officer – no evidence that department officer contacted bank officer – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), Schedule 2, cl 500.217; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 19 October 2018 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 12 March 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant meets Public Interest Criteria (PIC) 4020(1) and the requirements of cl.500.217 of Schedule 2 to the Regulations. Further, the delegate was not satisfied waiver of the requirements of PIC 4020 was justified.
5. The applicant appeared before the Tribunal on 16 September 2020 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Portuguese and English languages.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
8. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
 10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
 11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
 12. The primary issue for determination in this review is:
 - whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth:
 - a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that:
 - purports to have been, but was not, issued in respect of the person, or
 - is counterfeit or has been altered by a person who does not have authority to do so, or
 - was obtained because of a false or misleading statement, whether or not made knowingly.
 13. in relation to the visa application.
 14. In this review the applicant provided a copy of the record of the delegate's decision to the Tribunal. The Tribunal has read the decision.
 15. While assessing the visa application an officer of the Department of Home Affairs (the Department) investigated the authenticity of the bank statement provided to the Department as part of the visa application. The purpose of the bank statement was to establish the applicant meets the financial resources requirement for the grant of a Student visa. At face value, the bank statement was issued by bank Bradesco, and establishes the subject account had a credit balance of BRL75.893.87 on 31 August 2018.
 16. According to documentation contained in the Department file¹ and the record of the delegate's decision, the investigations were undertaken in Brazil by an officer of the
- ¹ Department file, folio 84: correspondence sent from the Department to the applicant. The applicant responded to this correspondence. All

Department already resident in Brazil: the information obtained by the investigating officer indicated the bank statement is a bogus document.

17. On 14 August 2018 an officer of the Department sent to the applicant an invitation to comment on the information that indicated the bank statement is a bogus document. The invitation, now quoted in part, stated:

"Analysis of the bank statement identified inconsistencies in the document's formatting, as well as its feature being inconsistent with those present in a genuine bank statement issued by this bank. Therefore, I am satisfied that the bank statement provided is a bogus document. There are serious concerns that you have provided a bogus document and information that is false and misleading in material particulars in order to obtain a visa to remain in Australia. If it is found that you have provided a bogus document and/or false and misleading information in relation to a visa application then this may result in an unfavourable outcome to your application for a Student visa. You are invited to comment on the matters referred to above and provide any evidence to support your comments."

18. In responding to the officer's concern, the applicant insisted the bank statement is a genuine document that relates to a current joint bank account he operates with his wife. The applicant also provided a statutory declaration to the assessing officer which specifically address the impugned statement. The affidavit declared that the bank statement was issued by bank Bradesco, located at Avenida Bragas, 115 Centro, Pecanha – MG112435286-48. The affidavit identifies the account holder by name. Other information in the application file established the named person is the applicant's wife, a resident of Brazil. The declaration purports to be signed by an official of bank Bradesco. The affidavit also states the deponent's business telephone number, and it depicts what appears to be a photocopy of an identification card.
19. The affidavit declares the impugned bank statement to be a genuine document that was issued in the branch of bank Bradesco identified in the affidavit, and that the account balance stated on the document is correct and available to the account holder.
20. Relevantly, the declaration invites all queries in relation to any aspect of the affidavit including, by necessary inference, queries about the authenticity of the affidavit, the authority and position of the declarant, and the impugned bank statement be directed to the declarant at bank Bradesco during business hours. The affidavit states the address of the bank, the name of the deponent, and their business hours telephone number.
21. There is no evidence or information before the Tribunal that establishes the person who deposed to the affidavit, or that an official of the branch of bank Bradesco identified in the affidavit, is the source of the information that impugned the bank statement.
22. There is no evidence before the Tribunal that established the Department's representative in Brazil was tasked to contact, attempted to contact, or contacted the person who apparently deposed to the truthfulness and accuracy of the matters declared in the affidavit. A telephone call to the number provided in the affidavit, or a visit to the relevant branch of bank Bradesco by the Department's representative in Brazil, presents as an inquiry that could have been made prior to the delegate's decision, in order to verify the authenticity of the affidavit and the accuracy of the facts stated in the affidavit.
23. The affidavit is an important document because it is evidence that contradicts the information obtained by the Department's representative in Brazil, being the information that initially impugned the authenticity of the bank statement. Consequently, neither the authenticity of the affidavit, nor the credibility of the person who deposed to facts stated in it have been investigated or directly by the Department.

24. The applicant stated in documents he filed at the Department and Tribunal, that the bank statement pertains to a joint bank account he operates jointly with his wife who resides in Brazil.
25. In evidence the applicant consistently maintained the impugned bank statement is a genuine document and, in support of his evidence, he relied on the affidavit of the official of the branch of bank Bradesco that has already been discussed in this decision.
26. Having regard to the initial information obtained by the Department that impugned the authenticity of the bank statement, together with the information contained in the affidavit that contradicts the initial information that impugned the authenticity of the bank statement; and, that the authenticity of the affidavit and the credibility of the person who deposed to it were not investigated or directly challenged by the Department; and, the applicant's evidence to the Tribunal: the information and evidence available to the Tribunal does not satisfy the Tribunal that the bank statement is a bogus document.
27. Therefore, the applicant meets PIC 4020(1).
28. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.500.217(1).

DECISION

29. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:
 - Public Interest Criterion 4020 for the purposes of cl.500.217(1) of Schedule 2 to the Regulations.

Peter Haag
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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